

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION**

CARROLL W. CARNICLE,

Plaintiff,

vs.

MICHAEL J. ASTRUE, Commissioner
of Social Security,

Defendant.

No. C07-0025

ORDER ON JUDICIAL REVIEW

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I. INTRODUCTION

This matter comes before the Court on the Complaint (docket number 3) filed by Plaintiff Carroll W. Carnicle on March 21, 2007, requesting judicial review of the Social Security Commissioner's decision to deny his application for Title II disability insurance benefits. Carnicle asks the Court to reverse the decision of the Social Security Commissioner ("Commissioner") and order the Commissioner to provide him disability insurance benefits. In the alternative, Carnicle requests the Court to remand this matter for further proceedings.

II. PRIOR PROCEEDINGS

Carnicle applied for disability insurance benefits on March 25, 2004. In his application, Carnicle alleged an inability to work since October 1, 2003 due to cardiomyopathy and damage to his lower heart. Carnicle's application was denied on June 24, 2004. On October 4, 2004, his application was denied on reconsideration. On November 9, 2004, Carnicle requested an administrative hearing before an Administrative Law Judge ("ALJ"). On November 15, 2005, Carnicle appeared with counsel before ALJ John P. Johnson for an evidentiary hearing. Carnicle, Carnicle's wife, Elizabeth Carnicle, and vocational expert Carma Mitchell testified at the hearing. In a decision dated June 29, 2006, the ALJ denied Carnicle's claim. The ALJ determined that Carnicle was not disabled and was not entitled to disability insurance benefits because he was functionally capable of performing work that exists in significant numbers in the national economy. Carnicle appealed the ALJ's decision. On January 18, 2007, the Appeals Council denied Carnicle's request for review. Consequently, the ALJ's June 29, 2006 decision was adopted as the Commissioner's final decision.

On March 21, 2007, Carnicle filed this action for judicial review. The Commissioner filed an answer on June 5, 2007. On August 17, 2007, Carnicle filed a brief arguing there is not substantial evidence in the record to support the ALJ's finding that he is not disabled and that there is other work in the national economy that he can perform.

On October 17, 2007, the Commissioner filed a responsive brief arguing the ALJ's decision was correct and asking the Court to affirm the ALJ's decision. On April 20, 2007, both parties consented to proceed before the undersigned in this matter pursuant to the provisions set forth in 28 U.S.C. § 636(c).

III. PRINCIPLES OF REVIEW

Title 42, United States Code, Section 405(g) provides that the Commissioner's final determination following an administrative hearing not to award disability insurance benefits is subject to judicial review. 42 U.S.C. § 405(g). 42 U.S.C. § 405(g) provides the Court with the power to: "[E]nter . . . a judgment affirming, modifying, or reversing the decision of the Commissioner . . . with or without remanding the cause for a rehearing." 42 U.S.C. § 405(g). "The findings of the Commissioner . . . as to any fact, if supported by substantial evidence, shall be conclusive . . ." *Id.*

The Court must consider "whether the ALJ's decision is supported by substantial evidence on the record as a whole." *Vester v. Barnhart*, 416 F.3d 886, 889 (8th Cir. 2005) (citing *Harris v. Barnhart*, 356 F.3d 926, 928 (8th Cir. 2004)). Evidence is "substantial evidence" if a reasonable person would find it adequate to support the ALJ's determination. *Id.* (citing *Sultan v. Barnhart*, 368 F.3d 857, 862 (8th Cir. 2004)). Furthermore, "[s]ubstantial evidence is 'something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions does not prevent an administrative agency's findings from being supported by substantial evidence.'" *Baldwin v. Barnhart*, 349 F.3d 549, 555 (8th Cir. 2003) (quoting *Cruse v. Bowen*, 867 F.2d 1183, 1184 (8th Cir. 1989), in turn quoting *Consolo v. Fed. Mar. Comm'n*, 282 U.S. 607, 620 (1966)).

In determining whether the ALJ's decision meets this standard, the Court considers "all of the evidence that was before the ALJ, but it [does] not re-weigh the evidence." *Vester*, 416 F.3d at 889 (citing *Guilliams v. Barnhart*, 393 F.3d 798, 801 (8th Cir. 2005)). The Court not only considers the evidence which supports the ALJ's decision, but also the evidence that detracts from his or her decision. *Guilliams*, 393 F.3d at 801. "[E]ven if

inconsistent conclusions may be drawn from the evidence, the agency's decision will be upheld if it is supported by substantial evidence on the record as a whole." *Id.* (citing *Chamberlain v. Shalala*, 47 F.3d 1489, 1493 (8th Cir. 1995)).

IV. FACTS

A. Administrative Hearing Testimony

1. Carnicle's Testimony

Carnicle was born in 1960. He graduated from high school and was employed in the dry cleaning business for fifteen years until his alleged disability onset date.¹ Carnicle's job duties included pressing and spotting clothes and customer service. Carnicle testified that he stopped working because "I was so short of breath and, and I couldn't -- I'd have spasm[s] at night where I could not breathe and, and finally got to the point where I couldn't even get up in the morning to go to work I was so exhausted."² Carnicle voluntarily stopped working and was not terminated from his employment. He has not worked since his alleged disability onset date of October 1, 2003. He is supported financially by his wife.

Carnicle testified that he suffers from heart problems, including an enlarged heart. He testified that his heart problems came on suddenly and "[i]t was just terrible for me, because I've always been a person that, I've always worked 10, 12, 15 hours a day and just, it got to the point where I couldn't even do it. Every muscle in my body ached and I, and I could never catch my breath or anything like that[.] . . ."³ Carnicle further testified that his cardiologist told him he had a weak heart and should limit his physical activity. Carnicle claimed that he couldn't walk up three steps without being winded or

¹ The record reflects that Carnicle worked for City Laundering Company, Inc. from 1985 to 1997, and then for Citywide Cleaners, Inc. from 1997 to 2003. Carnicle has no record of earnings for 2004 or 2005.

² See Administrative Record at 300.

³ *Id.* at 301-02.

walk 10 to 20 feet without having to stop and catch his breath. Carnicle lives in an apartment and has to climb 20 steps to get to it. When climbing the stairs, he testified that he has to stop and rest and then start when climbing again because he gets pain in his chest.

Carnicle also testified that he has had diabetes for about six years. He is insulin dependent. He takes approximately 400 units of insulin each day. A side effect of the diabetes is numbness in his feet, legs, and hands. He testified that he can't make a fist and has difficulty gripping things and writing his name. He also testified that the numbness in his feet and ankles cause him a great deal of pain, especially at night, and as a result, he has difficulty sleeping.

Carnicle and his attorney had the following exchange regarding his activities of daily living:

- Q: How do you spend an average day?
A: Sleeping and watching TV. I limit my physical activity to nothing, I just -- I'm tired and exhausted all day.
Q: Do you do any kind of household work, cleaning, vacuuming, anything --
A: No, no.
Q: Cooking?
A: No.
Q: Cleaning, helping --
A: Not anymore.
Q: And so do you do any socializing at all?
A: No, none.
Q: Belong to any clubs or organizations?
A: No.

(Administrative Record at 308-09) Carnicle testified that "I, I can't do anything and I just get so exhausted and the, and the body aches and pains that go along with it, because my heart doesn't oxygenate my blood or my muscles very well. And I [am] just exhausted, I can't hardly do anything just, just the way it is."⁴

⁴ See Administrative Record at 310.

Lastly, Carnicle's attorney asked him whether his heart condition or diabetes effects his attention and/or ability to concentrate. Carnicle responded that his attention and ability to concentrate are effected by his health conditions. Specifically, Carnicle testified:

Just the, just to study or read a magazine or a book or something like that, it's just tough for you. You got to hold it up in your hands, my arms get so tired and weak even holding a simple book up in the air for five or 10 minutes to read it. It's just like I just get exhausted and short of breath if I, if I would even try to do something like that.

(Administrative Record at 311)

The ALJ also questioned Carnicle on a variety of topics. The ALJ asked Carnicle whether he had driver's license, and if he did, how often he drove. Carnicle replied that he had a driver's license and drove about 12 miles per week. He testified that he drove his wife to work and also picked her up at the end of the day. The ALJ also asked Carnicle whether he had any management experience when he worked as a dry cleaner. Carnicle testified that he managed about 30 employees early in his career, but did not do any managing at his last place of employment. Carnicle further testified that while he was employed, he had experience working with and closing out a cash register. Lastly, the ALJ and Carnicle had the following colloquy regarding his functional limitations and activities of daily living:

Q: How far can you walk at a time?

A: Twenty feet at a time, 10, 20 feet. I got to stop and catch my breath.

Q: What about standing, how long can you just stand at a time?

A: Five, 10 minutes then my legs start to hurt and I get pains in my legs and arms. They get real heavy is what they do.

Q: Do you have any problems bending or stooping or squatting?

A: No.

Q: Any problems kneeling or crawling?

A: Yes.

Q: What type of problems do you have with that?
A: Well, on my knees I -- it just, just getting up from the kneeling position or down, up from being down on the floor takes everything I got to get up.

...

Q: How much can you lift at a time?
A: Maybe five pounds.
Q: If you lift more than that what happens?
A: I would absolutely be exhausted.
Q: Do you have any problems just sitting?
A: No.
Q: Do you have any problems using your arms --
A: Yes.
Q: -- to pull things or to reach --
A: Yes.
Q: -- your arms over your head?
A: Yes, I do.
Q: And what type of problems do you have with that?
A: They just, they get real heavy. It's, it's just a chore just to do any of that type of thing.
Q: When you drive do you have any problems operating the hand or foot controls?
A: No.
Q: Do you have any difficulty remembering things?
A: No, not really.
Q: Any problem keeping your mind on things?
A: Yeah, every once in a while. I -- you got so many things running through your mind at the same time and, and stuff. Its been a little bit of a problem.
Q: Any problems understanding things?
A: No.

...

Q: What time do you normally get up in the morning?
A: Five.
Q: And what time do you go to bed at night?
A: Usually about 8:30, 9:00.
Q: And do you have any problems sleeping?
A: Yeah. With my feet start hurting so bad it, it's hard to sleep.
Q: Do you have any problem performing activities such as bathing, dressing, feeding yourself?

A: No.

...

Q: How would you spend a typical morning, what would you be doing?

A: I get up and I take my wife to work, come back home and lay back down and, and rest until about 10 or 11:00 and then just watch TV for the rest of the day until she's ready to come home from work.

Q: What time do you pick her up?

A: It, it varies. It's usually around 6:00 though. It can be earlier.

Q: And do you have supper after that?

A: Yes.

Q: And after supper how would you spend the evening?

A: Just watching TV.

(Administrative Record 318-22)

2. Elizabeth Carnicle's Testimony

Elizabeth Carnicle ("Elizabeth") is Carnicle's wife. They have been married for eight years. At the hearing, Elizabeth testified that she and Carnicle worked together, and in late August or early September, 2003, she noticed a significant change in Carnicle. She testified that "[Carnicle] went from working 14-hour days and constantly keeping me going, going fishing, going hunting, hiking, just always going to not wanting to do anything. So then I knew something, something was wrong."⁵ Elizabeth described Carnicle's energy level as very low. She testified that "he just does nothing." She further testified that his inability to work and do other activities is difficult for him to deal with emotionally. She stated that he gets down a lot and cries several times per week because he is frustrated at his life situation.

⁵ See Administrative Record at 323.

Elizabeth also described Carnicle's physical health. She noted that he has difficulty climbing stairs. "He turns white, starts sweating, gets short of breath."⁶ Elizabeth testified that Carnicle suffers from leg pain which keeps him up at night because he needs to move around and find a comfortable position to relieve the pain. Lastly, she testified that he has difficulty walking, especially after getting up from a sitting position.

3. Vocational Expert's Testimony

At the hearing, the ALJ provided vocational expert Carma Mitchell with a hypothetical for an individual with the following limitations:

[The individual] cannot lift more than 10 pounds, standing or walking of two hours out of an eight-hour day. Sitting of six hours out of an eight-hour day with only occasional climbing. [The individual] should not work at unprotected heights and . . . should not be exposed to excessive heat, humidity or cold.

(Administrative Record at 329) The vocational expert testified that under such limitations, Carnicle could not return to any of his past work because of the lifting, standing, walking, and exposure to heat restrictions. The ALJ asked the vocational expert whether Carnicle had any skills acquired from his past work which would transfer to other work with the limitations provided in the hypothetical. The vocational expert replied:

Well, with my understanding of [Carnicle's] limitations he was doing the balancing of the money, that's a good thing, when he was like the working supervisor. And I feel that those types of skills, the customer service, the balancing the money at the end of the day, you know, would transfer to some low level semi-skilled, sedentary cashier jobs.

(Administrative Record at 330) Specifically, the vocational expert testified that Carnicle could perform work as check cashier (500 positions in Iowa and 50,000 positions in the nation) and sedentary gambling cashier (600 positions in Iowa and 56,000 positions in the

⁶ *Id.* at 324.

nation). The ALJ provided the vocational expert with a second hypothetical for an individual with the following limitations:

[The individual] cannot lift more than five pounds, stand for five to 10 minutes at a time, . . . walk 10 to 20 feet at a time, sit at least six hours out of an eight-hour day with only occasional kneeling, crawling, climbing, only occasional pushing or pulling. Only occasional work with the arms overhead, no work requiring continuous gripping and this individual should not be exposed to excessive cold.

(Administrative Record at 331) The vocational expert testified that under such limitations, Carnicle could not return to any of his past work or perform any full-time work in the national economy.

Carnicle's attorney also questioned the vocational expert. He asked whether competitive full-time employment would be precluded if Carnicle missed more than four days of work each month. The vocational expert replied that missing more than four days of work per month would preclude competitive full-time employment. Carnicle's attorney and the vocational expert had the following exchange regarding how Carnicle's ability to perform any jobs would be effected by manipulative limitations with his hands and difficulty with stamina:

Q: [Dr. Kozney says] that [Carnicle] shouldn't use his hands at all, zero grasp, turn, twist objects -- left-handed, not fine manipulation. And in terms of overhead -- would that eliminate those jobs --

A: Yes. The -- what you described first, the zero, I believe it was grasp, arm manipulation with hands, if that were precluded those jobs would not remain, or any work would remain.

. . .

Q: . . . If the person just had no stamina to do more than half an hour [of work] at a time, take a half hour break, that would preclude employment?

A: Yes, it would.

(Administrative Record at 334) Lastly, Carnicle's attorney asked the vocational expert whether Carnicle would be allowed to shift positions from sitting to standing or walking at will in the check cashier and gambling cashier positions. The vocational expert replied:

The person would have to be at least able to maintain a seated position for 30 to . . . 60 minutes at a time, you know, between there. And if it's, it's below where -- like every, less than 30 minutes they were able to sit, so they'd have to be getting up and moving around like walking, no, it wouldn't allow for those because they'd have to be able to stand in the same general area. On occasion the person could stand up, you know, say you get a kink in your legs, you could stand up, as long as you could continue to do that. But, no, not if you needed to actually get up and move around and leave your station.

(Administrative Record at 335)

B. Carnicle's Medical History

On July 25, 2003, Carnicle met with Merrilee Ramsey, ARNP ("Ramsey"),⁷ regarding blood pressure readings of 180/130. Ramsey diagnosed him with hypertension and found that he was a "severe noncompliant diabetic." Ramsey noted that she spent 20 minutes out of a 25 minute appointment "doing diabetic education and reinforcing how important it is to his overall health and life to improve his diabetic control."⁸ Ramsey also noted that Carnicle was willing to make changes in his lifestyle and his medical regimen in order to become more compliant with treating his diabetes. Ramsey treated Carnicle with medication.

On January 12, 2004, Carnicle visited Ramsey with complaints of shortness of breath. He informed Ramsey that he started having problems with shortness of breath two

⁷ The record indicates that Carnicle's regular treating physician was Dr. Robert J. Schultes, M.D., and Ramsey is a Nurse Practitioner who worked with Dr. Schultes and treated Carnicle in the past.

⁸ See Administrative Record at 181.

months prior to his visit, but it had gotten worse over the past several days. Ramsey noted that Carnicle would wake up in the middle of the night gasping for air. Ramsey ordered a chest X-ray for Carnicle. The X-ray showed mild ardiomegaly with bilateral pleural effusions. Ramsey treated Carnicle with medication.

On January 19, 2004, Carnicle returned to Ramsey for a follow-up on his “presumed congestive heart failure.” Ramsey noted that he was started on Furosemide and felt “much better.” Ramsey further noted that his blood sugars were still high even though he was on 80 units of insulin per day and Metformin. Ramsey diagnosed Carnicle with mild congestive heart failure and treated him with medication.

On January 30, 2004, Carnicle had an echocardiogram performed at the Mercy Medical Center in Cedar Rapids, Iowa. The results of the echocardiogram showed: (1) Severely reduced left ventricular function globally, (2) ejection fraction of 25-30%, (3) moderate left atrial enlargement, (4) moderate left ventricular enlargement, (5) 2+ moderate mitral regurgitation, (6) diastolic dysfunction with high filling pressures, likely secondary to systolic left ventricular dysfunction, and (7) mild pulmonary hypertension. Carnicle’s right ventricular size, right atrial size, aortic root size, and right ventricular function were normal.

On February 11, 2004, Carnicle was examined by Dr. Hisham M. Wagdy, M.D., regarding complaints of shortness of breath and chest pain. Dr. Wagdy noted that Carnicle had occasional lightheadedness and dyspnea on moderate exertion. An EKG was performed during the examination, and revealed normal sinus rhythm with left atrial enlargement and left ventricular hypertrophy. Dr. Wagdy diagnosed Carnicle with cardiomyopathy. Dr. Wagdy treated Carnicle with medication.

On February 18, 2004, Carnicle went to the University of Iowa Hospitals and Clinics (“UIHC”) and met with Dr. James D. Rossen, M.D., for evaluation of dilated cardiomyopathy. Dr. Rossen noted Carnicle’s history of cardiomyopathy:

[Carnicle] reports development of nocturnal dyspnea beginning approximately summer of 2003. This progressed, and in

January, he presented with volume overload. Symptoms, at that time, paroxysmal nocturnal dyspnea and dyspnea on walking short distances. Evaluation then included an echocardiogram, which showed a left ventricular dilation and severe diffuse left ventricular dysfunction. . . . He received treatment with diuretics and other medications for heart failure and noted very substantial improvement in his symptoms. At present, he can perform his normal daily activities, which require light physical exertion, without symptoms. He denies ankle edema, paroxysmal nocturnal dyspnea, orthopnea, chest pain, or syncope. He does occasionally note palpitations.

(Administrative Record at 197) Upon examination, Dr. Rossen found that Carnicle's carotid pulsation was normal and no carotid bruits. Dr. Rossen also found his heart sounds to be normal. Dr. Rossen diagnosed Carnicle with dilated cardiomyopathy, but determined that the etiology of his diagnosis was uncertain. Dr. Rossen opined that "[u]ncontrolled hypertension seems like a likely etiology. Other possibilities include a sequelae of viral myocarditis. Myocardial ischemia/infarction remains a possibility."⁹ Dr. Rossen ordered further tests before treating Carnicle. On February 24, 2004, Dr. Rossen performed a coronary angiography, left heart catheterization, left ventriculography, right heart catheterization, and peripheral angiography. Based on these tests, Dr. Rossen diagnosed Carnicle with severe chronic hypertension. Dr. Rossen treated Carnicle with medication.

On May 27, 2004, Carnicle saw Ramsey with complaints of abdominal pain. Ramsey noted that "[r]ecently we found that [Carnicle] has a grossly abnormal lipid profile with a cholesterol of 1288 [and] triglycerides of 6520."¹⁰ Ramsey further noted that Carnicle denied chest pain and shortness of breath. Carnicle's main complaints were bloating, morning nausea, occasional gagging of phlegm, and an achy pain in the left upper quadrant. Ramsey diagnosed Carnicle with abdominal pain, severe hyperlipidemia,

⁹ See Administrative Record at 197.

¹⁰ *Id.* at 175.

hypertriglyceridemia, and type II diabetes, insulin dependent. Carnicle was treated with medication and tests to rule out pancreatitis.

On June 23, 2004, Carnicle visited the St. Luke's Emergency and Trauma Center in Cedar Rapids, Iowa, for abdominal pain. Carnicle was evaluated by Dr. Anthony D. Carter, D.O., in the emergency room. Carnicle informed Dr. Carter that he had been having abdominal pains for three to four weeks. Carnicle went to the emergency room because he had increased pain. After examining him, Dr. Carter diagnosed Carnicle with abdominal pain, unclear etiology, left upper quadrant. Carnicle was admitted to the hospital for observation. At the hospital, Carnicle was examined by his regular treating physician Dr. Schultes. In his notes, Dr. Schultes reviewed Carnicle's emergency room evaluation:

[Carnicle] . . . states that he has had abdominal pain for about one month. He states that he seemed to have more problems today. He then came to the emergency room. [T]he emergency room workup showed no abnormalities but [Carnicle] continued to have pain making it unable for him to walk, therefore it was felt best to admit [him] to the hospital.

In the emergency room [Carnicle] had normal chest x-ray. The CT scan of the abdomen and pelvis showed marked hepatomegaly again. This was compatible with fatty infiltration.¹¹

(Administrative Record at 209) After examining Carnicle, Dr. Schultes found no acute distress and noted that he was able to get out of bed without any trouble. Dr. Schultes treated Carnicle with medication and ordered continued observation overnight. Carnicle was discharged from the hospital on June 25, 2004.

¹¹ Specifically, the CT scan revealed the following: (1) Marked hepatomegaly (enlarged liver), (2) moderate amount of colonic stool, (3) moderate sigmoid diverticulosis, but no evidence of diverticulitis, (4) prostatic calcifications, and (5) no solid masses, adenopathy, or inflammatory process in the abdomen or pelvis. *See* Administrative Record at 212.

Also on June 23, 2004, Dr. Richard Hornberger, M.D., reviewed Carnicle's medical records for Disability Determination Services ("DDS") and provided DDS with a residual functional capacity (RFC) assessment. Dr. Hornberger determined that Carnicle could: (1) frequently carry and/or lift 10 pounds, (2) stand and/or walk with normal breaks for a total of at least two hours in an eight-hour workday, (3) sit with normal breaks for a total of about six hours in an eight-hour workday, and (4) push and/or pull without limitations. Dr. Hornberger also determined that Carnicle had no postural, manipulative, visual, communicative, or environmental limitations. Dr. Hornberger found, however, that Carnicle had severe impairments, including Type II diabetes, hypertension, and dilated cardiomyopathy. Dr. Hornberger noted that Carnicle does little around the house, has some chest pain which lasts 3-4 minutes after exercise, climbs two flights of stairs to get to his apartment, but must rest before reaching the top of the stairs, and drives his wife to work everyday. Dr. Hornberger concluded that:

The total body of medical evidence indicates [Carnicle] does have a significant cardiomyopathy which is probably on the basis of his hypertension, compliance has been poor in controlling his hypertension and diabetes. [Carnicle], however, has had a significant response to his heart failure symptoms and has been essentially asymptomatic with ordinary activities. . . . [Carnicle] is capable of carrying on sedentary work activities.

(Administrative Record at 236) On October, 1, 2004, after reviewing Carnicle's medical records, Dr. Lawrence F. Staples, M.D., affirmed Dr. Hornberger's RFC assessment as written.

On January 18, 2005, Carnicle met with Dr. Richard J. Kozney, Jr., M.D., to "establish care." Dr. Kozney reviewed Carnicle's medical history and noted:

[Carnicle] has diabetes for the last 4-5 years. He does pretty much know how to follow a diabetic diet. He doesn't exercise because he has trouble walking because of his congestive heart failure. . . . He sees the University of Iowa for the dilated cardiomyopathy. He had a negative cardiac catheterization and doesn't know any specific cause of his dilated cardiomyopathy.

He had to leave his work because of this and is applying for disability. He can only walk half a block or a block because of the shortness of breath. No chest pain. He does have pain in both legs. He has been told he has diabetic neuropathy. . . . The pain is there all the time, 24 hours a day and bothers him especially at night because he has trouble sleeping with it. It has been there for 6-8 months.

(Administrative Record at 281) Dr. Kozney diagnosed Carnicle with diabetes mellitus, type II, and diabetic neuropathy. Dr. Kozney treated Carnicle with medication. On February 15, 2005, Carnicle had a follow-up appointment with Dr. Kozney. Dr. Kozney noted that the pain associated with Carnicle's diabetic neuropathy was "pretty much" resolved with medication (Cymbalta).

On April 18, 2005, Carnicle saw Dr. Kozney with complaints of pain in his right ankle and right leg. Carnicle informed Dr. Kozney that his medication for the diabetic neuropathy did not relieve this particular leg pain. Dr. Kozney treated Carnicle by increasing his dosage of the diabetic neuropathy medication.

On May 5, 2005, Carnicle had a follow-up appointment with Dr. Kozney. Carnicle continued to have pain in his legs due to diabetic neuropathy and also complained of palpitations. Specifically, Carnicle informed Dr. Kozney that he had been having palpitations for a couple of months. He indicated that he would get a pounding in his chest accompanied by chest pain and shortness of breath. He further indicated that the palpitation occurred once or twice per day and lasted for several minutes. Dr. Kozney ordered an EKG for Carnicle. The results of the EKG were "okay." Dr. Kozney also had Carnicle continue the medication he was taking to treat his diabetic neuropathy. Carnicle also complained of numbness in his thumbs during the day. Dr. Kozney diagnosed Carnicle with carpal tunnel syndrome and told him to wear wrist splints at night. Lastly,

Dr. Kozney noted that after adjusting his medication, Carnicle's diabetes was under better control.¹²

On November 7, 2005, Dr. Kozney filled out an RFC questionnaire provided by Carnicle's attorney. Dr. Kozney diagnosed Carnicle with congestive heart failure. Dr. Kozney indicated that Carnicle's prognosis was poor. Dr. Kozney identified Carnicle's symptoms as follows: Fatigue, difficulty walking, rapid heart beat/chest pain, swelling, general malaise, muscle weakness, nausea/vomiting, extremity pain and numbness, frequency of urination, sweating, dizziness/loss of balance, and hyper/hypoglycemic attacks. Dr. Kozney also noted clinical findings of a cardio ejection fraction of 25-30% and dilated cardiomyopathy. Dr. Kozney opined that Carnicle's impairments were expected to last at least twelve months. Dr. Kozney further opined that during a typical workday, Carnicle's experience of pain or other symptoms would not be so severe as to interfere with his attention or concentration to perform even simple tasks. Dr. Kozney also found that Carnicle was capable of high work stress. Dr. Kozney noted that Carnicle could only walk about 20 feet due to breathing problems, could sit at one time for more than two hours, and could stand at one time for fifteen minutes. Dr. Kozney determined that Carnicle could stand/walk less than two hours in an eight-hour workday and could sit at least six hours in an eight-hour workday. Dr. Kozney noted that Carnicle did not need a job that required periods of walking around in an eight-hour workday, permitted the shifting of positions at will from sitting, standing, or walking, or allowed him to take unscheduled breaks during an eight-hour workday. Dr. Kozney suggested that Carnicle would need to have his legs elevated 10 inches for about six hours during an eight-hour workday. Dr. Kozney limited

¹² Carnicle continued to visit Dr. Kozney regularly from June, 2005 through September, 2005. Carnicle's medical records from those months indicate the medication prescribed by Dr. Kozney helped relieve the pain in his legs associated with his diabetic neuropathy, but he continued to have numbness in his hands due to the carpal tunnel syndrome. Carnicle followed Dr. Kozney's treatment advise and continued to wear wrist splints to treat the carpal tunnel syndrome.

Carnicle to rarely lifting less than 10 pounds and never lifting 10, 20, or 50 pounds in a competitive work situation. Dr. Kozney further limited Carnicle to rarely climbing ladders or stairs, occasionally crouching or squatting, and frequently being able to twist and stoop. Dr. Kozney further noted that Carnicle had significant limitations with reaching, handling, and fingering. Specifically, Dr. Kozney opined that Carnicle could grasp, turn, or twist objects and use his fingers for fine manipulation 0% of the time in an eight-hour workday. Dr. Kozney further limited Carnicle to reaching only 10% of the time in an eight-hour workday. Dr. Kozney also determined that Carnicle should avoid even moderate exposure to cigarette smoke and all exposure to extreme heat and high humidity. Lastly, Dr. Kozney opined that Carnicle would miss more than four days of work per month due to his impairments.

V. CONCLUSIONS OF LAW

A. ALJ's Disability Determination

The ALJ determined that Carnicle is not disabled. In making this determination, the ALJ was required to complete the five-step sequential test provided in the social security regulations. *See* 20 C.F.R. § 404.1520(a)-(f); *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987); *Page v. Astrue*, 484 F.3d 1040, 1042 (8th Cir. 2007); *Anderson v. Barnhart*, 344 F.3d 809, 812 (8th Cir. 2003). The five steps an ALJ must consider are:

- (1) whether the claimant is gainfully employed, (2) whether the claimant has a severe impairment, (3) whether the impairment meets the criteria of any Social Security Income listings, (4) whether the impairment prevents the claimant from performing past relevant work, and (5) whether the impairment necessarily prevents the claimant from doing any other work.

Goff v. Barnhart, 421 F.3d 785, 790 (8th Cir. 2005) (citing *Eichelberger v. Barnhart*, 390 F.3d 584, 590 (8th Cir. 2004)); *see also* 20 C.F.R. § 404.1520(a)-(f). “If a claimant fails to meet the criteria at any step in the evaluation of disability, the process ends and the claimant is determined to be not disabled.” *Eichelberger*, 390 F.3d at 590-91 (citing *Ramirez v. Barnhart*, 292 F.3d 576, 580 (8th Cir. 2002)).

“To establish a disability claim, the claimant bears the initial burden of proof to show that he [or she] is unable to perform his [or her] past relevant work.” *Frankl v. Shalala*, 47 F.3d 935, 937 (8th Cir. 1995) (citing *Reed v. Sullivan*, 988 F.2d 812, 815 (8th Cir. 1993)). If the claimant meets this burden, the burden of proof then shifts to the Commissioner to demonstrate that the claimant retains the residual functional capacity to perform a significant number of other jobs in the national economy that are consistent with claimant’s impairments and vocational factors such as age, education, and work experience. *Id.* The RFC is the most an individual can do despite the combined effect of all of his or her credible limitations. 20 C.F.R. § 416.945. “‘It is the ALJ’s responsibility to determine a claimant’s RFC based on all relevant evidence, including medical records, observations of treating physicians and others, and claimant’s own descriptions of his [or her] limitations.’” *Tellez v. Barnhart*, 403 F.3d 953, 957 (8th Cir. 2005) (quoting *Pearsall v. Massanari*, 274 F.3d 1211, 1217 (8th Cir. 2001)).

The ALJ applied the first step of the analysis and determined that Carnicle had not engaged in substantial gainful activity since his alleged disability onset date, October 1, 2003. At the second step, the ALJ concluded, from the medical evidence, that Carnicle had the following impairments “dilated cardiomyopathy, insulin diabetes, hypertension, obesity, history of asthma and bronchitis, history of carpal tunnel syndrome, diabetic neuropathy, and depression.” At the third step, the ALJ found that Carnicle did not have “an impairment or combination of impairments listed in, or medically equal to one listed in [20 C.F.R. § 404,] Appendix 1, Subpart P, Regulations No. 4 [(the Listing of Impairments)].”

At the fourth step, the ALJ determined Carnicle’s RFC as follows:

[Carnicle] has the maximum functional capacity to lift and carry no more than 10 pounds. [Carnicle] can sit for six hours and can stand and walk for no more than two hours total in an eight-hour workday. He can no more than occasionally climb. He cannot work around unprotected heights. He cannot be exposed to excessive heat, humidity, or cold.

Using this RFC, the ALJ determined that Carnicle met his burden of proof at the fourth step, because he was unable to perform his past relevant work. However, at the fifth step, the ALJ determined that Carnicle, based on his age, education, previous work experience, and RFC, could work at jobs that exist in significant numbers in the national economy. Therefore, the ALJ concluded Carnicle was “not disabled.”

B. Whether the ALJ Fully and Fairly Developed the Record

Carnicle contends that the ALJ erred in two respects. Carnicle argues that the ALJ erred by failing to afford Dr. Kozney’s opinion that he was unable to sustain full-time work activity controlling weight. Carnicle also argues that the ALJ provided inadequate analysis under *Polaski v. Heckler*, 739 F.2d 1320 (8th Cir. 1984) in determining the credibility of his subjective allegations of pain, functional limitation, and disability. Carnicle requests that the Court reverse the Commissioner’s decision and remand it with directions to award benefits. Alternatively, Carnicle requests this matter be remanded for further proceedings. The Commissioner argues that there is substantial evidence in the record as a whole which supports the ALJ’s decision; and therefore, the decision should be affirmed.

1. Dr. Kozney’s Opinions

Carnicle argues that the medical evidence in the record supports Dr. Kozney’s opinion that his impairments preclude him from being able to perform full-time competitive employment. Carnicle further argues that the ALJ’s reason(s) for discounting Dr. Kozney’s opinions are insufficient under the requirements of the Social Security Regulations. Specifically, Carnicle asserts that the ALJ failed to provide good reasons in his decision for discounting Dr. Kozney’s opinions. The Commissioner argues that the ALJ properly discounted Dr. Kozney’s opinions because the doctor’s opinions are not supported by substantial evidence in the record as a whole and are inconsistent with the record as a whole.

An ALJ is required to “assess the record as a whole to determine whether treating physicians’ opinions are inconsistent with substantial evidence on the record.” *Travis v.*

Astrue, 477 F.3d 1037, 1041 (8th Cir. 2007) (citing 20 C.F.R. § 404.1527(d)(2)). The opinion of a treating physician:

should not ordinarily be disregarded and is entitled to substantial weight. A treating physician's opinion regarding an applicant's impairment will be granted controlling weight, provided the opinion is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the record.

Singh v. Apfel, 222 F.3d 448, 452 (8th Cir. 2000) (citations omitted). The regulations provide that the longer the treating relationship between a physician and a patient, the more weight should be given to that treating physician's medical opinions. *See* 20 C.F.R. § 404.1527(d)(2)(I). Furthermore, an ALJ is "encouraged to give more weight to the opinion of a specialist about medical issues related to his or her area of specialty than to the opinion of a source who is not a specialist." *Singh*, 222 F.3d at 452. The regulations require an ALJ to give "good reasons" for giving weight to statements provided by a treating physician. *See* 20 C.F.R. § 404.1527(d)(2). The regulations also require an ALJ to give "good reasons" for rejecting statements provided by a treating physician. *Id.* "Although a treating physician's opinion is entitled to great weight, it does not automatically control or obviate the need to evaluate the record as a whole." *Hogan v. Apfel*, 239 F.3d 958, 961 (8th Cir. 2001) (citing *Prosch v. Apfel*, 201 F.3d 1010, 1013 (8th Cir. 2000)). "The ALJ may discount or disregard such an opinion if other medical assessments are supported by superior medical evidence, or if the treating physician has offered inconsistent opinions." *Id.*; *see also Travis*, 477 F.3d at 1041 ("A physician's statement that is 'not supported by diagnoses based on objective evidence' will not support a finding of disability. *Edwards v. Barnhart*, 314 F.3d 964, 967 (8th Cir. 2003). If the doctor's opinion is 'inconsistent with or contrary to the medical evidence as a whole, the ALJ can accord it less weight.' *Id.*"); *Strongson*, 361 F.3d at 1070 (an ALJ does not need to give controlling weight to a physician's RFC assessment if it is inconsistent with other substantial evidence in the record); *Cabrnoch v. Bowen*, 881 F.2d 561, 564 (8th Cir. 1989)

(the resolution of conflicts of opinion among various treating and examining physicians is the proper function of an ALJ).

The record demonstrates that the ALJ considered Dr. Kozney's opinions. In his decision, the ALJ offers a detailed summary of Carnicle's medical records, including information from both Dr. Kozney's treatment notes and an RFC questionnaire Dr. Kozney filled out for Carnicle's attorney.¹³ The ALJ uses this information at step two of the sequential test to determine that Carnicle has "medically determinable impairments."¹⁴ Later, at step four of the sequential test, the ALJ addresses the weight he gives Dr. Kozney's opinions.¹⁵ The ALJ states:

One of [Carnicle's] treating physicians indicated [he] was more limited than the undersigned finds. . . . In this case the treating physician opinion is not supported. Tests and examinations failed to reveal signs indicative of the treating physician opinion. Therefore, the undersigned gives the opinion little weight.

(Administrative Record at 24) The ALJ does not address or explain his reasons for finding Dr. Kozney's opinions to be of little weight. The ALJ simply makes a conclusory observation that Dr. Kozney's opinions are not supported and "[t]ests and examinations failed to reveal signs indicative of the treating physician opinion." The ALJ does not address, however, the medical evidence, tests, or examinations that he relied on in determining that Dr. Kozney's opinions are unsupported by the record. An ALJ has a duty to develop the record fully and fairly. *Cox*, 495 F.3d at 618. The regulations require an ALJ to give "good reasons" for rejecting statements provided by a treating physician. *See*

¹³ *See* Administrative Record at 21.

¹⁴ Step two requires the ALJ to determine whether a claimant has a severe impairment. *See Goff*, 421 F.3d at 790; 20 C.F.R. § 404.1520.

¹⁵ Step four requires the ALJ to determine whether, based on a claimant's RFC, he or she is able to perform his or her past relevant work. *See Goff*, 421 F.3d at 790; 20 C.F.R. § 404.1520.

20 C.F.R. § 404.1527(d)(2). The Court finds that the ALJ has failed to meet these requirements. The ALJ did not provide any reasons other than conclusory statements, let alone “good reasons,” for granting little weight to Dr. Kozney’s opinions. Therefore, the Court finds that this matter should be remanded so that the ALJ may fully and fairly develop the record with regard to Dr. Kozney’s opinions. On remand, the ALJ shall provide clear reasons for accepting or rejecting Dr. Kozney’s opinions and support his reasons with evidence from the record.

2. Credibility Determination

Carnicle also argues that the ALJ improperly discredited his testimony regarding his subjective allegations of pain, functional limitations, and total disability. Carnicle maintains that the ALJ misapplied the *Polaski* factors for determining the credibility of his testimony at the administrative hearing and failed to adequately explain his reasons for discrediting his subjective allegations of disability. The Commissioner argues that the ALJ properly considered Carnicle’s subjective complaints.

When evaluating the credibility of a claimant’s subjective complaints, the ALJ may not disregard them “solely because the objective medical evidence does not fully support them.” *Polaski*, 739 F.2d at 1322. However, the absence of objective medical evidence to support a claimant’s subjective complaints is a relevant factor for an ALJ to consider. *Gowell v. Apfel*, 242 F.3d 793, 796 (8th Cir. 2001) (citation omitted). “The [ALJ] must give full consideration to all the evidence presented relating to subjective complaints, including the claimant’s prior work record, and observations by third parties and treating and examining physicians relating to such matters as: (1) the claimant’s daily activities; (2) the duration, frequency, and intensity of the pain; (3) precipitating and aggravating factors; (4) dosage, effectiveness and side effects of medication; [and] (5) functional restrictions.” *Polaski*, 739 F.2d at 1322. Subjective complaints may be discounted if inconsistencies exist in the evidence as a whole. *Pelkey v. Barnhart*, 433 F.3d 575, 578 (8th Cir. 2006) (citing *Polaski*, 739 F.2d at 1322). However, the ALJ must give reasons

for discrediting the claimant. *Id.* (citing *Strongson*, 361 F.3d at 1072. Where an ALJ seriously considers, but for good reason explicitly discredits a claimant's subjective complaints, the Court will not disturb the ALJ's credibility determination. *Johnson v. Apfel*, 240 F.3d 1145, 1148 (8th Cir. 2001) (citing *Pena v. Chater*, 76 F.3d 906, 908 (8th Cir. 1996)); *see also* *Guilliams*, 393 F.3d at 801 (explaining that deference to an ALJ's credibility determination is warranted if the determination is supported by good reasons and substantial evidence). "The credibility of a claimant's subjective testimony is primarily for the ALJ to decide, not the courts.'" *Wagner v. Astrue*, 499 F.3d 842, 851 (8th Cir. 2007) (quoting *Pearsall*, 274 F.3d at 1218).

In his decision, the ALJ properly set forth the law for making credibility determinations under *Polaski* and the Social Security Regulations.¹⁶ The ALJ's decision also provides a detailed summary of Carnicle's subjective allegations of pain, functional limitations, and disability. The ALJ failed to apply the law, however, in determining the credibility of Carnicle's testimony and subjective allegations. The ALJ simply states "[t]he undersigned finds that [Carnicle] is not generally credible and that his statements regarding his symptoms and resulting limitations are given little weight."¹⁷ The ALJ's decision

¹⁶ *See* Administrative Record at 18.

¹⁷ *Id.* at 19. The ALJ also notes, after making his credibility determination, that "[Carnicle] has recorded earnings for each year from 1985 to 2003, lending some credibility to [his] contention of disability." *Id.* The Court does not find that ALJ's consideration of Carnicle's work history supports his credibility determination because the ALJ fails to explain how a factor which lends "some credibility" to his allegations of disability comports with the conclusion that he is "not generally credible." The ALJ further notes that Carnicle's ability to drive his wife to and from work, groom himself, and vacuum, take out the trash, and grocery shop once per week with help from others, indicates "a greater capacity for exertional and cognitive demands than [Carnicle] asserts he has." *Id.* The Court finds that the ALJ's reasoning with regard to Carnicle's daily activities alone, and without further explanation, is not enough for a full credibility determination. *See Reed v. Barnhart*, 399 F.3d 917, 923 (8th Cir. 2005) ("Although '[a]cts which are inconsistent with a claimant's assertion of disability reflect negatively (continued...)

provides no reasons for discounting Anderson's testimony other than his allegations are not "generally credible." *See Pelkey*, 433 F.3d at 578 (the ALJ must give reasons for discrediting a claimant). Furthermore, while the ALJ does mention Carnicle's prior work history and daily activities (*see* footnote 17), the ALJ does not give full consideration to all of the evidence relating to Carnicle's subjective complaints, or explain how the information he does discuss discredits Carnicle's testimony. *See Polaski*, 739 F.2d at 1322 (an ALJ must give full consideration to all the evidence presented relating to subjective complaints); *Pelkey*, 433 F.3d at 578 (the ALJ must give reasons for discrediting a claimant). Because the ALJ's decision lacks any discussion of the reasons for discrediting Carnicle, except that his allegations are not "generally credible" and does not fully consider all of the evidence relating to Carnicle's subjective complaints, or consider all of the *Polaski* factors, the Court finds that remand is appropriate for the ALJ to further develop the record with regard to the credibility of Carnicle's subjective allegations of pain, functional limitations, and total disability. Furthermore, on remand, the ALJ shall completely apply the *Polaski* factors, fully consider all of the evidence, and provide well developed and good reasons for finding Carnicle credible or not credible.

C. Reversal or Remand

The scope of review of the Commissioner's final decision is set forth in 42 U.S.C. § 405(g) which provides in pertinent part:

The court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or

¹⁷ (...continued)

upon that claimant's credibility,' *Johnson v. Apfel*, 240 F.3d 1145, 1148 (8th Cir. 2001), 'this court has repeatedly observed that 'the ability to do activities such as light housework and visiting with friends provides little or no support for the finding that a claimant can perform full-time competitive work.' *Burress*, 141 F.3d at 881; *see also Banks v. Massanari*, 258 F.3d 820, 832 (8th Cir. 2001) ('How many times must we give instructions that [watching television, visiting friends, and going to church] do not indicate that a claimant is able to work full time in our competitive economy?').").

reversing the decision of the Secretary, with or without remanding the cause for a rehearing.

42 U.S.C. § 405(g). The Eighth Circuit Court of Appeals has stated that:

Where the total record is overwhelmingly in support of a finding of disability and the claimant has demonstrated his [or her] disability by medical evidence on the record as a whole, we find no need to remand.

Gavin v. Heckler, 811 F.2d 1195, 1201 (8th Cir. 1987); *see also Beeler v. Brown*, 833 F.2d 124, 127 (8th Cir. 1987) (finding reversal of denial of benefits was proper where “the total record overwhelmingly supports a finding of disability”); *Stephens v. Sec’y of Health, Educ., & Welfare*, 603 F.2d 36, 42 (8th Cir. 1979) (explaining that reversal of denial of benefits is justified where no substantial evidence exists to support a finding that the claimant is not disabled). In the present case, the Court concludes that the medical records as a whole do not “overwhelmingly support a finding of disability.” *Beeler*, 833 F.2d at 127. Instead, the ALJ simply failed to fully and fairly develop the record with regard to Dr. Kozney’s opinions and Carnicle’s credibility determination. Accordingly, the Court finds that remand is appropriate.

VI. CONCLUSION

The Court concludes that this matter should be remanded to the Commissioner for further proceedings. On remand, the ALJ should develop the record fully and fairly with regard to the opinions of Dr. Kozney and explain his reasons for accepting or rejecting those opinions. The ALJ should also consider all of the evidence relating to Carnicle’s subjective allegations, address his reasons for crediting or discrediting those allegations, and properly apply the *Polaski* factors when determining Carnicle’s credibility with regard to his subjective complaints of pain, functional limitations, and total disability.

VII. ORDER

For the foregoing reasons, it is hereby **ORDERED**:

This matter is **REVERSED** and **REMANDED** to the Commissioner of Social Security pursuant to sentence four of 42 U.S.C. § 405(g), for further proceedings as discussed herein.

DATED this 12th day of February, 2008.



JON STUART SCOLES
United States Magistrate Judge
NORTHERN DISTRICT OF IOWA